IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2897 OF 2006

Bharat Petroleum Corporation Ltd.
having its registered office at
Bharat Bhavan, 4&6, Currimbhoy
Road, Ballard Estate,
Mumbai 400 001. .. Petitioner.

Vs.

Precious Finance Investment
Pvt. Ltd. having its office at
C-221, Maker Chambers,
V.Nariman Point,
Mumbai 400 021. .. Respondent.

Mr.S.R.Page for the petitioners.
Ms.Rajini Iyer i/b Mr.K.D.Shah for the respondents.

CORAM : D.B.BHOSALE, J.

DATED : 20TH OCTOBER, 2006

JUDGMENT:

. Heard learned counsel for the petitioners and the respondents.

2. The order dated 4.3.2006 rejecting the application for amendment of written statement under Order 6 Rule 17 of the Code of Civil Procedure (for short "CPC") passed by the learned Judge of the Small Causes Court at Mumbai, is now under challenge before this Court by way of the writ petition under Article 227 of the Constitution of India filed at the instance of the defendants-petitioners, hereinafter referred to as "the defendants".

3. The suit has been filed by the plaintiffs-respondent, hereinafter referred to as "the plaintiffs", on 11th November, 2003 against the defendants interalia contending that the plaintiffs required a suit premises i.e. plot of land bearing C.S.No.3/590 and 4/590 with the building standing thereon comprising seven flats or dwelling units, garage, covered spaces for car parks, servant quarters and compound, situate at L.Jagmohandas Marg, Mumbai, reasonably for their growing needs. It is further contended that the tenancy of the defendants has been terminated by notice dated 23.9.2003 and they are entitled to vacant possession of the suit premises from them. In the suit, besides the prayer for possession of the suit premises, the plaintiffs have also prayed for institution of an enquiry into mesne profits under Order 20, Rule 12 of the CPC and for final determination of the mesne profits payable to the plaintiffs. The defendants filed a written statement on 12th January, 2004 and prayed for dismissal of the suit with costs, being false, frivolous and vexatious. On 15.3.2004 issues were framed, and it appears, the evidence of the plaintiffs' witness has already been recorded and while the suit was at the stage of evidence of the defendants being recorded, on 20th October, 2005 they have filed an application

seeking amendment of the written statement bearing interim notice no.414 of 2005 in T.E.& R.Suit No.257/279 of 2003.

4. The defendants sought to amend the written statement and add paragraph 13A contending therein that they are paying and have paid municipal taxes including Maharashtra Tax on larger premises in respect of the suit premises to the Bombay Municipal Corporation and have paid the same till 31.3.2005. On the basis thereof, the defendants have further contended in paragraph 13A that the payment of municipal taxes amounts to payment of rent and, therefore, the defendants having paid the municipal taxes in respect of the suit premises even after service of the notice to quit dated 23.9.2003 and filing of the suit without any objection by the plaintiffs amounts to waiver of the said notice to quit and since suit is based on that notice, it is not maintainable and liable to be dismissed. In the application, the defendants have specifically stated that the payment of taxes is being looked after by their administration department and the instructions to their advocate in the matter were given by the legal department and they were not aware about the payment of municipal taxes after termination notice dated 23.9.2003 when the written statement, filed on

12.1.2004, was being prepared.

5. The application seeking amendment was opposed by the plaintiffs interalia on two grounds. Firstly, the defendants have not offered satisfactory explanation to show that inspite of due diligence they could not have raised the matter before the commencement of trial. On the contrary, according to the plaintiff, the explanation offered in the application clearly show that whatever has been sought to be added, by way of an amendment, was within their knowledge and they could have very well stated so in the written statement. In other words, in view of the proviso added to Rule 17 of Order 6 of the Code of Civil Procedure, (for short "the CPC") once trial commences, such amendment cannot be allowed unless the party seeking an amendment satisfies the court that inspite of due diligence, the party could not have sought such amendment earlier. Secondly, it was opposed on the ground that the averments sought to be incorporated in the written statement clearly show that the application for amendment is not bonafide and the same is filed only with a view to delay hearing of the suit.

6. I have heard the learned counsel for the parties at length on the question whether in the face

of the proviso to Rule 17 of Order 6 of CPC, if the trial has commenced, the amendment could be allowed unless the party seeking an amendment satisfies the court that inspite of due diligence, it could not have raised the matter before the commencement of trial and whether the amendment sought in the present case deserves to be allowed by applying the said test.

7. Mr.Page, learned counsel for the defendants, at the outset, submitted that proviso added to Rule 17 of Order 6 by the Civil Procedure Code (Amendment) Act of 2002 (for short "Amendment Act 2002") cannot come in way of the court while dealing with an application for amendment if the amendment sought is found to be necessary for the purpose of determining the real questions in controversy between the parties. The trial Court has committed gross error of law in holding that the principles laid down by the Supreme Court or High Courts prior to the Amendment Act of 2002, which came in force on 1.7.2002, cannot be applied or taken recourse to while dealing with the application under Order 6 Rule 17, filed after 1.7.2002. He submitted that even if it is assumed that what the learned Judge has held is correct the explanation offerred in the application filed by the defendants is sufficient to hold that inspite of due diligence the plea they sought to introduce could not

have been raised when the written statement was filed.

8. On the other hand Ms.Rajini Iyer, learned senior counsel for the plaintiffs, at the outset invited my attention to the statement of objects and reasons of the Amendment Act of 2002 to contend that the court while dealing with the application for amendment filed after the said Amendment act came into force and after the commencement of trial it is mandatory for the party seeking amendment to satisfy the court that inspite of due diligence, the party could not have raised the matter earlier. The object of inserting the proviso was to prevent frivolous applications which are filed to delay the trial. She, therefore, submitted that the trial court having taken the proviso into consideration has rightly rejected the amendment holding that the principle laid down by the Supreme Court, in the case cited before the trial Court, prior to 1.7.2002, cannot be applied or taken recourse to, in the present case, while dealing with the application of the defendants under Order 6 Rule 17. The defendants have filed the application only with a view to delay the trial. She placed strong reliance, in support of her submissions, on the judgment of the Apex Court in **Salem Advocate Bar Association T.N. Vs. Union of India (2005) 6 SCC 344**. She submitted that in any case the defendants

cannot claim that inspite of due diligence they could not have sought the amendment before the commencement of trial since payment of taxes was within their knowledge. The defendants cannot take advantage of their two independent departments dealing with different subjects for showing the cause for condonation of delay, contending that inspite of due diligence they could not have filed such application for amendment earlier. She further submitted that the amendment sought is also inconsistent with the original pleadings.

9. To address the question raised in the instant petition I deem it appropriate to reproduce the provisions contained in Rule 17 of Order 6 of the CPC. The Rule 17 reads thus:

> "17. The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.
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> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

10. From bare perusal of this provision, it is clear that it consist of two parts. The first part is

that the court may at any stage of the proceedings allow either party to amend his pleadings and the second part is that such amendment shall be made for the purpose of determining the real question in controversy raised between the parties. This provision confers wide power and unfettered discretion on the court to allow amendment of pleadings to the party in such manner and on such terms as it appears to the court as just and proper. By the Amendment act of 2002, the proviso has been added to Rule 17, Order 6 by which the right of a party seeking an amendment has been circumscribed as now it does not permit a litigant to amend the pleadings after commencement of trial, unless he satisfies the court that inspite of due diligence, such amendment could not have been sought earlier.

11. At this stage I would like to make brief reference to the background against which proviso to Rule 17 has been inserted. After 1976, the CPC was amended by the Code of Civil Procedure (Amendment) Act, 1999 (for short "Amendment Act of 1999) with a view to cutting short the delay in disposal of suits. After its enactment there was stiff resistance from the members of the Bar against its enforcement. The Bar Council of India, a statutory body constituted under the Advocate’s Act, was at forefront in opposing

certain amendments and in particular deletion of Rule 17 of Order 6 by the Amendment Act of 1999. The Amendment Act of 1999, therefore, could not be promptly notified for enforcement. The Legislature, after consulting various concerned and based on the outcome of the deliberations introduced the Amendment Act of 2002 with effect from 1.7.2002. The purpose of such like amendments as stated in the statement of Object and Reasons is "to reduce delay in the disposal of civil cases". The Supreme Court in **Salem Advocate Bar Association's** (supra) had an occasion to consider the constitutional validity of all the provisions in Amendment Act of 2002, wherein in paragraph 26 of the judgment it has held, insofar as Order 6 Rule 17 is concerned, as follows:

> "26. Order 6 Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act, 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. **Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision."**
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> (emphasis supplied)

12. From bare perusal of this paragraph and considering the statement of objects and reasons it is clear that if the application is filed under Order 6 Rule 17 after commencement of the trial, it cannot be allowed unless the court comes to the conclusion that inspite of the due diligence such amendment could not have been sought earlier. The object is to prevent frivolous application which are filed to delay the trial.

13. It is now well settled, that the Code of Civil Procedure is "procedure" something designed to facilitate the justice and further its ends. The object of prescribing procedure is to advance the cause of justice. The Supreme Court in **Sangram Singh Vs. Election of Tribunal, Kotah & Anr. AIR 1955 SC 425** has highlighted three principles to be applied while interpreting any portion of the CPC. These principles are re-iterated recently by the Supreme Court in **Kailash Vs. Nanhku and Others 2005 AIR SCW 2346**. The highlighted principles reads thus:

> "(i) A Code of procedure must be regarded as such. It is 'procedure' something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties: not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefor be guarded against (provided always that justice is done to 'both' sides) lest the very

> means designed for the furtherance of justice be used to frustrate it.
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> (ii) There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that effect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to.
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> (iii) No forms or procedure should ever be permitted to exclude the presentation of the litigant's defence unless there be an express provision to the contrary."

14. On careful reading of the language of the proviso to Rule 17 Order 6 of CPC, it is clear that it casts an obligation on the party applying for amendment, after commencement of the trial, to offer an explanation to the satisfaction of the court so as to come to the conclusion that inspite of "due diligence", the party could not have raised the matter before the commencement of trial. The proviso does not deal with the power of the court and also does not specifically take away the power of the court to allow the amendment after the commencement of trial. It empowers the court to reject the application if it comes to the conclusion that inspite of "due diligence", the party could not have sought the amendment before the commencement of trial. The provision contained in Order 6 Rule 17 is procedural.

It is not a part of substantive law. The object behind introducing the proviso in the present shape is to curb the mischief of unscrupulous litigant adopting dilactory tactics to delay the disposal of the cases and to defeat the right of opposite party approaching the court for quick relief and also to cause serious inconvenience of the court faced with frequent prayers for adjournment. The object is to expedite the hearing and not to scuttle the same. The purpose of such like amendments is stated in the statement of objects and reasons as "to reduce delay in disposal of civil cases". The Supreme Court has so stated in **Kailash Vs. Nankhu** (supra).

15. The Dictionary meaning of the expression "due diligence" as given in the Blacks Law Dictionary, Sixth Edition, 1990 means "Such a measure of prudence, activity or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case." Similarly the Law Lexicon by P.Ramanatha Aiyer, Second Edition (Reprint) 2001 explains "due diligence" to mean such watchful caution and foresight as the circumstances of the particular case demands. While examining the explanation offered or cause shown as to why inspite

of due diligence a party could not have raised the matter before commencement of trial, the court may have to see the circumstances in which the party is seeking amendment. In short the explanation as to "due diligence" depends upon the particular circumstances and the relative facts of each case to reach a conclusion one way or the other.

16. The Supreme Court in **Tarlok Singh Vs. Municipal Corporation of Amritsar and Anr. 1986(4) SCC 27** has observed that the provisions of the Code were made applicable for the purpose of guidance of procedure and it is not expected that the procedure of a suit was to be followed technically and strictly in accordance with the provisions contained in the Code.

17. In **Kailash Vs. Nanhku** (supra) the Supreme Court while cosidering whether the provisions contained in Rule 1 of Order 8 of CPC is mandatory or directory in paragraph 27 has made the following observations :

> "27. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the Statute,

> the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justce."

18. As stated earlier, the provisions contained in Rule 17 of Order 6 too belong to the domain of procedural law. It expects the litigant to make an application for amendment before the trial commences so as to avoid any hindrance in the progress of the trial. It does not deal with the power of the Court and does not specifically take away the power of the court to allow the amendment even after the commencement of trial. Considering the object and purpose behind enacting the proviso to Rule 17 of Order 6 in the present form and context in which the provision is placed, I am of the opinion, that it has to be construed as directory and not mandatory. While dealing with the applications under Order 6 Rule 17 of CPC, filed after the commencement of the trial, seeking amendment of the pleadings the principles/guidelines laid down before 1.7.2002 by the Supreme Court and High Courts in a catena of decisions should be followed/observed while allowing or rejecting such application, particularly if the amendment is found to be necessary for the purpose of determining the real questions in controversy between the parties. However, I may not be misunderstood as

nullifying the entire force, impact and vigour of the provision, the delay tactics adopted by the litigant. The satisfaction of the court that the application for amendment is not frivolous and not filed to delay the trial is paramount particularly when such application is filed after the commencement of trial. Therefore, what is necessary is proper/sufficient explanation and the particular circumstances which should reflect in the application seeking amendment whenever it is filed after the commencement of trial to enable the court to reach the conclusion that inspite of due diligence the party could not have raised the matter before the commencement of trial. The Judge dealing with an application for amendment must, therefore, deal with the application with firmness.

19. During last two and half months I have come across several writ petitions under Article 227 of the Constitution of India challenging the orders passed by the courts below either rejecting or allowing the amendment in exercise of the powers under Order 6 Rule 17 of the CPC. Often, I have observed that the courts below either completely overlook the guidelines and the principles laid down by the Supreme Court and High Courts or they are not known to the concerned Judges. At most of the places in mofussil, law journals, such as Supreme Court cases, Judgment today etc., do not

reach on time or do not reach at all. A lack of infrastructure and well equipped libraries at taluka places further handicap the courts. Therefore, I take this opportunity to refer to some of the judgments of the Supreme Court and this court including the judgments relied upon by the learned counsel appearing for the parties laying down the principles/guidelines which could be applied or borne in mind and followed while dealing with the applications for amendment under Order 6 Rule 17 of the CPC.

20. As back as in 1957 the Supreme Court in **L.J.Leach and Co. Ltd. & Anr Vs. M/s.Jairdine Skinner and Co. AIR 1957 SC 357** had an occasion to deal with the provisions contained in Rule 17 of Order 6 read with section 151 of CPC. The Supreme Court and High Courts have followed this judgment in a catena of decisions thereafter. The relevant observations in the judgment reads thus:

> "16. **It is no doubt true that Courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application**. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and **does not affect the power of the Court to order it, if that is required in the interest of justice**. In Charan Das V. Amir Khan, 47 Ind App 255: (A.I.R. 1921 P C 50) (A) the Privy Council observed :
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> That there was full power to make the

> amendment cannot be disputed and though such a power should not as a rule be exercised where the effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are out-weighed by the special circumstances of the case".

21. **In M/s.Modi Spinning & Weaving Mills Co. Ltd. and Anr. Vs. M/s.Ladha Ram & Co. (1976) 4 SCC 320** in paragraph 10 the Supreme Court has held that inconsistent pleas can be made in the pleadings. In **Heeralal Vs. Kalyan Mal and Others (1998) 1 Supreme Court Cases 278** the Supreme Court has reiterated the aforesaid principle. The relevant observations in **M/s.Modi Spinning & Weaving Mills Co. Ltd.** (supra) read thus:

> "10. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paragraphs 25 and 26 is not making consistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial Court.

22. Again in **B.K.Narayana Pillai Vs. Parameshwaran & Anr. (2000) 1 SCC 712** the Supreme Court when had an occasion to deal with the same provision, in paragraph 3 held thus:

> "3. The purpose and object of Order 6 Rule 17

> CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. **The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court**. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that **the courts while deciding such prayers should not adopt a hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties**. Amendments are allowed in the pleadings to avoid uncalled-for multiplicity of litigation".
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> (emphasis supplied)

. Thereafter the Supreme Court in paragraph 4 in the judgment of **B.K.Narayana Pillai Vs. Parameshwaran Pillai** (supra) has proceeded to consider its various judgments and has recorded the following conclusions:

> . "**The principles applicable to the amendments of the plaint are equally applicable to the amendments of the written statements. The courts are more generous in allowing the amendment of the written statement as the question of prejudice is less likely to operate in that event. The defendant has a right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to injustice and that any admission made in favour of the plaintiff is not withdrawn.** All amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken. **Inconsistent and contradictory allegations in negation to the admitted**

> **position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings**. Proposed amendment should not cause such prejudice to the other side which cannot be compensated by costs. No amendment should be allowed which amounts to or relates to sic results in defeating a legal right accruing to the opposite party on account of lapse of time. **The delay in filing the petition for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement**".
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> (emphasis supplied)

23. The Supreme Court in **Ragu Thilak D.John Vs. S.Rayappan and Others (2001) 2 SCC 472** has held that the dominant purpose of allowing the amendment is to minimise the litigation. The plea that the relief sought by way of amendment was barred by time is arguable in the circumstances of the case. The plea of limitation being disputed could be made a subject-matter of the issue after allowing the amendment prayed for.

24. Recently, the Supreme Court in **Balasaria Construction (P) Ltd. Vs. Hanuman Seva Trust and Others. (2006) 5 SCC 658** has reiterated the well settled principle of law that the question of limitation is a mixed question of law and fact and ex-facie on the reading of the plaint it cannot be held that the suit is barred by the limitation. In

other words, the suit could not be dismissed as barred by the limitation without proper pleadings, framing of an issue of limitation and taking of evidence. The plea that the relief sought by way of the amendment was barred by the time, therefore, being arguable, it could be made the subject matter of the issue after allowing the amendment prayed for.

25. In **Gurdial Singh and Others Vs. Raj Kumar Aneja and Others (2002) 2 Supreme Court Cases 445**, the Supreme Court had an occasion to deal with the provisions contained in Order 6 Rule 17 and section 153 of the CPC exhaustively. The reference to paragraph 13, 18, and 19 thereof may be useful, which reads thus:

> "13. Before parting **we feel inclined to make certain observations about the loose practice prevalent in the subordinate courts in entertaining and dealing with applications for amendment of pleadings**. It is a disturbing feature and, if such practice continues, it is likely to thwart the course of justice. The application moved by the occupants for amendment in their written statement filed earlier did not specifically set out which portions of the original pleadings ere sought to be deleted and what were the averments which were sought to be added or substituted in the original pleadings. What the amendment applications did was to give in their applications a vague idea of the nature of the intended amendment and then annex a new written statement with the application to be substituted in place of the original written statement. Such course is stranger and unknown to the procedure of amendment of pleadings. A pleading, once filed, is a part of the record of the court and cannot be

touched, modified, substituted, amended or withdrawn except by the leave of the court. Order 8 Rule 9 of CPC prohibits any pleadings subsequent to the written statement of a defendant being filed other than by way of defence to a set-off or counterclaim except by the leave of the court and upon such terms as the court thinks fit. Section 153 CPC entitled "General power to amend" provides that the court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding. **Order 6 Rule 17 CPC confers a discretionary jurisdiction on the court exercisable at any stage of the proceedings to allow either party to alter or amend his pleadings in such manner and on such terms as may be just**. The Rule goes on to provide that all such amendments shall be made as may by necessary for the purpose of determining the real question in controversy between the parties. Unless and until the court is told how and in what manner the pleading originally submitted to the court is proposed to be altered or amended, the court cannot effectively exercise its power to permit amendment. **An amendment may involve withdrawal of an admission previously made, may attempt to introduce a plea or claim barred by limitation, or, may be so devised as to deprive the opposite party of a valuable right accrued to him by lapse of time and so on. It is, therefore, necessary for an amendment applicant to set out specifically in his application, seeking leave of the court for amendment in the pleading, as to what is proposed to be omitted from or altered or substituted in or added to the original pleading.**

18. Thus, **once a prayer for amendment is allowed the original pleading should incorporate the changes in a different ink or an amended pleading may be filed wherein with the use of a highlighter or by underlining in red the changes made may be distinctly shown**. The amendments will be incorporated in the pleading by the party with the leave of the court and within the time limited for that purpose or else within fourteen days as

provided by Order 6 Rule 18 CPC. The court or an officer authorized by the court in this behalf, may compare the original and the amended pleading in the light of the contents of the amendment application and the order of the court permitting the same and certify whether the amended pleadings conforms to the order of the court permitting the amendment. Such practice accords with the provisions of the Code of Civil Procedure and also preserves the sanctity of record of the court. It is also conducive to the ends of justice inasmuch as by a bare look at the amended pleading the court would be able to appreciate the shift in stand, if any, between the original pleading and the amended pleading. These advantages are in addition to convenience and achieving maintenance of discipline by the parties before the court.

19. **When one of the parties has been permitted to amend his pleadings, an opportunity has to be given to the opposite party to amend his pleading. The opposite party shall also have to make an application under Order 6 Rule 17 CPC which, of course, would ordinarily and liberally be allowed. The phrase "consequential amendment" finds mention in the decision of this Court in Bikram Singh V.Ram Baboo**. The expression is judicially recognized. While granting leave to amend a pleading by way of consequential amendment the court shall see that the plea sought to be introduced is by way of an answer to the plea previously permitted to be incorporated by way of an amendment by the opposite party. **A new plea cannot be permitted to be added in the garb of a consequential amendment, though it can be applied by way of an independent or primary amendment.**"

(emphasis supplied)

26. In **Sampath Kumar Vs. Ayyakannu & Anr. (2002) 7 SCC 559** the Supreme Court once again while dealing with provisions contained in Order 6 Rule 17, in paragraph 9 and 10 has made observations which reads

thus:

> "9. Order 6 Rule 17 CPC confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting forth and seeking determination of the real question in controversy between the parties shall be permitted to be made. **The question of delay in moving an application for amendment should be decided not calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded.** Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In the former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter cases the question of prejudice to the opposite party may raise and that shall have to be answered by reference to the facts and circumstances of each individual case. No straitjacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment.
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> 10. **An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation-back in the context of amendment of pleadings is not one of universal application and in appropriate cases the court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit** and to the extent permitted by it shall be deemed to have been brought before the court on the date on which the application seeking the amendment was filed. (See observations in Siddalingamma V. Mamtha Shenoy)."
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> (emphasis supplied)

27. This Court in **Badrinarayan Bansilal Somani Vs. Vinodkumar K.Shah 2003 (2) Mh.L.J.120** had an occasion

to consider whether the proviso to Rule 17 of Order 6 as added by Amendment act of 2002 is attracted to the pleading filed prior to 1st July, 2002. The learned Single Judge of this Court after considering section 16 of the Amendment Act of 2002 as also the judgment of the Apex Court in Anant Gopal Sheorey Vs. The State of Bombay AIR 1958 SC 915 has held that the proviso to Rule 17 of Order 6 would not apply to the pleadings which were filed prior to 1.7.2002. I find myself in agreement with the opinion expressed by the learned Single Judge.

28. In **Pankaja and Anr. Vs. Yellappa (Dead) by LRs and Ors (2004) 6 SCC 415** once again the Supreme Court while dealing with order 6 Rule 17 in paragraph 14 and 16 thereof held thus :

> "14. The law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not allow an amendment being discretionary, the same will have to be exercised on a judicious evaluation of the facts and circumstances in which the amendment is sought. **If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straitjacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case.**
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> 16. This view of this Court has, since, been

> followed by a three-Judge Bench of this Court in the case of T.N.Alloy Foundry Co.Ltd. v. T.N.Electricity Board. **Therefore, an application for amendment of the pleading should not be disallowed merely because it is opposed on the ground that the same is barred by limitation, on the contrary, application will have to be considered bearing in mind the discretion that is vested with the court in allowing or disallowing such amendment in the interest of justice.**"
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> (emphasis supplied)

29. In **Pradeep Singhvi and Anr. Vs. Heero Dhankani & Others (2004) 13 SCC 432** the Supreme Court while dealing with the provisions of Order 6 Rule 17 and proviso thereto held that the court has discretion to permit such amendment as would be necessary for purpose of determining real questions in controversy between the parties at any stage of the proceedings provided it is neither drastically altering nature of defence nor withdrawing admissions made earlier by the defendants. The relevant observations in the said judgment reads thus:

> "3. We have heard the learned counsel for the parties. We do not find merit in the submission made on behalf of the respondents that the proposed amendment would have had the effect of drastically altering the nature of the defence or withdrawing an admission made earlier by the defendants. **Under Order 6 Rule 17 CPC, the court has discretion to permit at any stage of the proceedings such amendment in the pleadings as would be necessary for the purpose of determining the real questions in controversy between the parties.**
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> 4. Of course, **by the time the defendants moved an application for amending the written statement, the trial had commenced but the**

> **proposed amendment, if allowed, would not have irreparably prejudiced the plaintiffs. At the most, the plaintiff would have been re-examined**. We do not think that the trial court was justified in refusing the prayer for amendment in written statement which would have the effect of excluding the defendants from raising a plea material for their defence".

30. In **Rajesh Kumar Aggarwal & Others Vs. K.K.Modi & Others (2006) 4 SCC 385** in paragraph 18 and 19 thereof the Supreme Court held thus:

> "18. As discussed above, **the real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused.** On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary have expressed certain opinions and entered into a discussion on merits of the amendment. In cases like this, **the court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard the rights of both parties and to subserve the ends of justice**. It is settled by a catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the court.
>
> 19. While considering whether an application for amendment should or should not be allowed, **the court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment."**
>
> (emphasis supplied)

31. In **Baldev Singh & Ors. etc Vs. Manohar Singh & Anr. JT 2006 (7) SC 139** the Supreme Court has once again exhaustively dealt with the provisions contained in Rule 17 of Order 6. Some observations therein need to be reproduced by which the Supreme Court has laid down certain guidelines and principles. In paragraph 14 of the judgment the Supreme Court has observed that "In our view, the powers of the court are wide enough to permit amendment of the written statement by incorporating an alternative plea in the application for amendment of the written statement". Then the Supreme Court after referring to its judgment in **Estralla Rubber V. Dass Estate (P) Ltd. (2001) 8 SCC 97** has proceeded to reproduce the following observations made therein:

> "Even if there was some admissions in the evidence as well as in the written statement, it was still open to the parties to explain the same by way of filing an application for amendment of the written statement. That apart, mere delay of three years in filing the application for amendment of the written statement could not be a ground for rejection of the same when no serious prejudice is shown to have been caused to the plaintiff/respondent no.1 so as to take away any accrued right".

. Thereafter in paragraph 15 the following observations are made :

> "15. ... ... It is now well settled that an

> amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. It is true that some general principles are certainly common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim relating to amendment of the written statement Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action. Accordingly, in the case of amendment of written statement, the courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is less likely to operate with same rigour in the former than in the latter case".

32. The Supreme Court in the judgment of **Baldev Singh** (supra) has considered the proviso to Rule 17 of Order 6 and has made the following observations:

> "17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 of the CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High court and the trial court. That apart, **commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments**. As noted herein after, parties are yet to file their documents, **we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 of the CPC which confers wide power and unfettered discretion to the court to allow an amendment of the written statement at**

any stage of the proceedings".

(emphasis supplied)

33. From the aforesaid discussion and the judgments the following principles/guidelines broadly emerge:

(i) The proviso to Order 6 Rule 17 is procedural and not a part of substantive law. It does not deal with the power of the court and also does not specifically take away the power of the court to allow the amendment after the commencement of trial. It only empowers the court to reject the application if it comes to the conclusion that inspite of "due diligence", the parties could not have sought the amendment before the commencement of trial.

(ii) The proviso to Rule 17 of Order 6 of the CPC, in the present form and context, is directory and not mandatory. While dealing with the application under Order 6 Rule 17 courts can apply the principles/guidelines laid down by the Supreme Court and High Courts before the Amendment Act of 2002 came into force, if the amendment is found to be necessary for the purpose of determining the real questions in controversy between the parties even after the commencement of trial.

(iii) While dealing with the application under Order 6 Rule 17 made after commencement of the trial, the court should, all the time and at all the stages, bear in mind the force, impact and vigour of the provision and see that it is maintained and not nullified and that the application is not filed to delay the trial.

(iv) The commencement of the trial as mentioned in proviso to Order 6 Rule 17 of CPC must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of documents.

(v) Once a prayer for amendment is allowed the original pleadings should incorporate the changes in a different ink or an amended pleading may be filed wherein with the use of a highlighter or by underlining in red the changes made may be distinctly shown.

(vi) The applicant should specifically set out which portions of the original pleadings were sought to be deleted and what were the averments which were sought to be added or substituted in the original pleadings. The applications giving a vague idea of the nature of the intended amendment and then annex a

new written statement with the application to be substituted in place of the original written statement cannot be and should not be allowed.

(vii) The applicant, seeking amendment, should offer sufficient and proper explanation mentioning the particular circumstances against which an amendment was sought to enable the court to reach the conclusion that inspite of due diligence the applicant could not have raised the matter before the commencement of trial.

(viii) Once a prayer for amendment is allowed the party should incorporate the amendment in the pleadings within the time limited for that purpose or else within 14 days as provided by Order 6 Rule 18 of the CPC. As far as possible the courts while allowing the amendment should direct the party to carry out amendment within timeframe.

(ix) When one of the parties has been permitted to amend his pleading, an opportunity has to be given to the opposite party to amend his pleading. The opposite party shall also have to make an application under Order 6 Rule 17 of CPC which, ofcourse, would ordinarily and liberally be allowed. Such amendments are known as "consequential amendments". However, a

new plea cannot be permitted to be added in the garb of a consequential amendment, though it can be applied by way of an independent or primary amendment.

(x) An amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. The plaintiff cannot be allowed to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim. However, adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action. The courts are, therefore, required to take more liberal view in allowing amendment of written statement than of plaint and question of prejudice is less likely to operate with same rigour in former than in latter case.

(xi) The courts while deciding the application for amendment should not adopt a hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Amendment need to be allowed to avoid uncalled-for multiplicity of litigation.

(xii) The defendant has a right to take an

alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to injustice and that any admission made in favour of the plaintiff is not withdrawn and it should not result in defeating a legal right accuring to the plaintiff on account of lapse of time.

(xiii) The delay in filing the petition for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement.

(xiv) If it is permissible for the plaintiff to file an independent suit, the same relief which could be prayed for in a new suit should be permitted to be incorporated in the pending suit by way of an amendment. Such amendment would curtail multiplicity of legal proceedings.

(xv) Inconsistent plea, in a given case, can also be allowed to be raised by the defendants in the written statement. However, an inconsistent plea which would displace the plaintiff completely from the admissions made by the defendants in the written

statement, however, cannot be allowed. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants.

(xvi) The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments should be allowed more liberally than those which are sought to be made after commencement of the trial and after conclusion thereof.

(xvii) The court can allow amendment of pleadings even at the appellate stage for the purpose of determining the real question in controversy between the parties or if it is necessary for the effective decision of the case. However, the delay in seeking an amendment must be explained satisfactorily and that it should not cause injustice to the other side or it should not affect the right already accrued to the other side. At appellate stage none of the parties could be allowed to withdraw the admissions or pleadings, if the rights are accrued to the other side.

(xviii) If the application for amendment is allowed after the commencement of trial and if the proposed amendment has the effect of altering the nature of the defence the plaintiff can claim re-examination of the witness/es and if he makes such claim the court should allow such prayer.

(xix) While considering whether an application for amendment should be allowed, the court is not expected to go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment.

(xx) An Amendment once incorporated relates back to the date of the suit. However, the doctrine of "relation-back" in the context of amendment of pleadings is not one of universal application and in appropriate cases the court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the court on the date on which the application seeking amendment was

filed.

(xxi) An application for amendment of the pleading should not be disallowed merely because it is opposed on the ground that the same is barred by limitation. On the contrary, application will have to be considered bearing in mind the discretion that is vested with the court in allowing or disallowing the amendment in the interest of justice. The plea of limitation being a mixed question of law and fact can be made a subject matter of the issue after allowing the amendment prayed for.

34. The aforesaid principles and guidelines carved out are only illustrative and not exhaustive. They may be borne in mind whenever court deal with application under Order 6 Rule 17 and may apply/follow where the amendment prayed for is found to be necessary for the purpose of determinig the real questions in controversy between the parties.

35. In the present case the defendants in their application seeking amendment and in particular paragraphs 5, 6 and 7 thereof have explained the circumstances against which they filed the application. The defendants are a public sector undertaking and a company incorporated under the

provisions of the Companies Act, 1956 and is one of the largest petroleum corporations in India. The Government of India has 51% share in this company. It has several departments including the legal department and the administration department and every department has independent functions and they are assigned with specific duties. The General Manager (Administration) of the defendants on affidavit in support of the Notice of Motion taken out under Order 6 Rule 17 in paragraphs 4 and 5 thereof has stated that the payment of taxes are being looked after by the administration department whereas the legal department takes care of legal matters and the matters in courts. In the instant case the legal department had given instructions to prepare written statement and when the written statement was being prepared it had no knowledge about the payment of taxes. The General Manager has further stated that one department of the Corporation would not know the working of other department and, therefore, while preparing the written statement on instructions of the legal department it had no knowledge about the taxes being paid by the administration department. Though it is necessary to have reasonable co-ordination between the two departments it cannot be said that what has been stated in the application and in the affidavit in support thereof is false or imaginary one.

36. Although no special indulgence can be shown to the petitioner-company merely because it is a Government company, in similar circumstances, is not shown to an individual suitor, one cannot but take a practical view of the working of such companies without being unduly indulgent to the typical working of its different departments. Certain amount of latitude is not impermissible. Moreover, the expression "sufficient cause" should, as settled by the Apex Court in a catena of decisions, be considered with pragmatism and in justice - oriented approach rather than technical detection of sufficient cause for explaining every day's delay. What counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. The factors which are peculiar to and characteristic of the functioning of such companies would require adoption of pragmatic approach in justice-oriented process. Such company cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whereas such corporations have their typical working through its executives and different departments.

37. The Legislature has conferred the powers to

condone delay by enacting section 5 of the Indian Limitation Act of 1963 in order to enable the courts to do substantial justice to the parties by disposing of matters on merits. The expression 'sufficient cause' employed is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice. Looking to the facts and circumstances of the present case I am of considered view that the petitioner did not stand to benefit by filing the application at belated stage and in any case there is no scope to presume that the delay has occasioned deliberately. Similarly, the amendment sought cannot be termed as inconsistent with the original stand taken by the petitioner in their written statement. In other words, the claim, that they have sought to introduce by way of amendment, is not inconsistent with their original pleadings in the written statement.

38. In the facts of the present case, in my opinion, the amendment prayed for is necessary for the purpose of determining the real questions in controversy between the parties and if it is allowed no irreparable prejudice would be caused, to the plaintiff merely because the trial has commenced. At the most the plaintiffs can claim re-examination of the witness/es after the amendment is carried out by

the defendants. The trial Court has rejected the amendment holding that the principle laid down by the Supreme Court prior to the amendment cannot be taken recourse to. Merely because the application for amendment is made after the Amendment Act came into force does not mean that the principles laid down by the Supreme Court and High Courts while dealing with the application under Order 6 Rule 17 prior to the amendment cannot be applied.

39. In the present case, as observed earlier the explanation offered, in my opinion, is sufficient to hold that despite due diligence the defendants could not have raised the matter before the commencement of trial and that no prejudice whatsoever will be caused to the plaintiffs if the amendment is allowed. The delay caused in filing the application seeking amendment, therefore, deserves to be condoned. In the circumstances the Rule is made absolute. The impugned order dated 4.3.2006 is quashed and set aside. The application bearing Notice No.414 of 2005 is allowed subject to payment of costs of rupees 3000/- to be paid to the plaintiff before carrying out the amendment. The defendants are directed to carry out the amendment within four weeks from the date of receipt of this judgment. It would be open for the respondent-plaintiffs to seek re-examination of its

witness/es after the amendment is carried out. If such prayer is made it may be allowed. The trial Court shall proceed with the case and dispose it of as expeditiously as possible and preferably within a period of one year from the date of receipt of this order.

(D.B.Bhosale, J.)